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8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA

10
11 In re:
12 EXCEL INNOVATIONS, INC.,
13 TAX IDN 94-3094727
14 Debtor.

Case No. 04-53874 ASW
Chapter 7
Date: February 8, 2013
Time: 2:15 p.m.
Judge: Honorable Arthur S. Weissbrodt
Place: 280 South First Street, Room 3020
San Jose, California 95113

15
16 **TRUSTEE'S RESPONSE TO JEFFERSON T. STAMP'S**
17 **SUPPLEMENTAL MEMORANDUM**
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1 TO THE HONORABLE ARTHUR S. WEISSBRODT, UNITED STATES BANKRUPTCY
2 JUDGE; AND JEFFERSON T. STAMP:

3 COMES NOW, Marc Del Piero (the "Trustee"), the Chapter 7 trustee of the bankruptcy
4 estate of Excel Innovations, Inc. (the "Debtor" or "Excel"), and hereby submits this response to
5 the supplemental memorandum filed by Jefferson T. Stamp ("Mr. Stamp"), at ECF No. 926, as to
6 (1) Mr. Stamp's motion to enforce an alleged attorney's lien against property of the estate; (2) the
7 Trustee's objection to Claim No. 14, as amended; and (3) Mr. Stamp's objection to the Trustee's
8 motion to approve the compromise of claims among several administrative claimants.

9 This is a case in which Mr. Stamp admits he already received compensation from Excel
10 pre-petition, and seeks to be paid even more from a limited sum of money that others generated
11 after years of litigation in bankruptcy, when there is precious little in the estate to pay the
12 administrative and general unsecured creditors under a carefully negotiated compromise. Mr.
13 Stamp has made two claims in this case: (1) Claim No. 14, originally filed on June 11, 2009 for a
14 general unsecured claim for the balance of a bonus in the amount of \$20,000; and (2) Claim No.
15 25, filed on January 10, 2012 as a Chapter 11 administrative claim for attorney's fees in the
16 amount of \$156,000, which included the alleged bonus of \$20,000 referenced in Claim No. 14.
17 The Trustee objected to Claim No. 25 on the grounds that Mr. Stamp was not entitled to an
18 administrative claim for his attorney's fees, in relevant part, because Mr. Stamp failed to satisfy
19 the employment and compensation requirements at 11 U.S.C. §§ 327 and 330. *See* ECF No. 851.
20 The Court sustained the Trustee's objection and entered an order disallowing Claim No. 25. *See*
21 ECF No. 879.

22 **I. Mr. Stamp Asserts a New Claim to the Surprise of All Parties Under the Guise**
23 **of an Amendment to Claim No. 14, Which Is Untimely and Does Not Relate**
24 **Back to the Original Claim.**

25 After the Trustee noticed out the compromise reached with the administrative creditors that
26 excluded Mr. Stamp's disallowed claim and objected to Claim No. 14 in November 2012, Mr.
27 Stamp clearly took the position that if he was not going to be paid with everyone else, then he
28 should be paid before anyone else is paid. Moreover, if Mr. Stamp could not get paid for his
alleged post-petition work, he would go back to pad his hours for compensation on a new pre-

1 petition claim under the cover of an amendment to Claim No. 14.¹ Mr. Stamp filed the purported
2 amendment on December 5, 2012 – *almost a year after the bar date, 3 ½ years after filing the*
3 *original claim, and 8 ½ years since the commencement of this case.* To the surprise of all parties
4 in interest and this Court, Mr. Stamp now claims to have an attorney’s lien for as much as
5 \$248,000!

6 The decision to allow an amended claim is within the sound discretion of the court. *In re*
7 *Grivas*, 123 B.R. 876, 878 (Bankr. S.D. Cal. 1991). Although amendments are generally allowed
8 to a timely filed proof of claim, such as to cure a defect in the original claim, describe the claim
9 with greater particularity, or plead a new theory on previously filed facts, an amendment made
10 after the bar date should not be allowed if it represents only an attempt to file a new claim under
11 the guise of an amendment. *In re Int’l Horizons, Inc.*, 751 F.2d 1213, 1216 (11th Cir. 1985). The
12 original claim must “give fair notice of the conduct, transaction or occurrence that forms the basis
13 of the claim asserted in the amendment.” *In re Westgate-California Corp.*, 621 F.2d 983, 984 (9th
14 Cir. 1980). Amendments are allowed “only where the original claim prompted notice to the court
15 of the existence, nature, and amount of the [amended] claim.” *Int’l Horizons*, 751 F.2d at 1217.

16 When Mr. Stamp originally filed Claim No. 14 on June 11, 2009, the proof of claim listed
17 only a general unsecured claim for \$20,000, which represented the balance of a bonus allegedly
18 owed pursuant to the attached Amendment to Attorney-Client Agreement dated August 31, 2003
19 (the “Amended Agreement”). The original claim contained no other components and attached no
20 further documents. On these facts, the Trustee and any other party in interest could not have fair
21 notice that Mr. Stamp would amend his Claim No. 14 to assert an entirely new claim for
22 attorney’s fees allegedly earned under an hourly rate, which is not stated or described, and for the
23 period of January 1, 2004 to June 17, 2004, especially when Mr. Stamp’s employment terminated
24 under the express terms of the Amended Agreement on December 31, 2003; or further, to assert
25 that this new claim and the bonus are secured by an attorney’s lien that is not mentioned anywhere

26
27 ¹ Claim No. 14, as amended, asserts Mr. Stamp is owed \$228,000 for attorney services over 28 weeks from
28 January 1, 2004 to the petition date, June 17, 2004, at 40 hours per week, at \$250 per hour under the Agreement, and
the balance of the bonus of \$20,000, for a total of \$248,000. Mr. Stamp’s recently filed memorandum corrects this
claim by calculating only 24 weeks during the same period, at 40 hours per week, and \$250 per hour, for a total of
\$240,000, less \$44,000 paid pre-petition, plus the \$20,000 bonus, for a total of \$216,000.

1 in the Amended Agreement. Mr. Stamp's attempt to take the lion's share of the limited estate is
2 not a claim that has any relation back to the original claim. The initial proof of an alleged bonus
3 did not give fair notice of any basis upon which Mr. Stamp now alleges to have a claim to
4 additional compensation at an hourly rate and that these fees are secured by an attorney's lien
5 against the entire proceeds of the estate. Accordingly, Mr. Stamp's amendment to Claim No. 14
6 must be disallowed.

7
8 **II. The Allowance of Claims Is an Equitable Process, and Mr. Stamp Is Barred
From Asserting His New Claim to the Detriment of All the Parties in Interest.**

9 By filing a claim against the estate, a creditor submits himself to the court's equitable
10 jurisdiction and triggers the process of allowance and disallowance of claims. *See*
11 *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 58-59 (1989). Significantly, Mr. Stamp raised this
12 new pre-petition claim for as much as \$248,000, purportedly secured by an attorney's lien, only
13 after the Court disallowed Mr. Stamp's administrative claim in its entirety. Throughout the
14 narrative to Claim No. 25, Mr. Stamp asserts consistently that his "compensation was a flat rate of
15 \$8,000 per month plus an incentive bonus of \$25,000" from April 1, 2003 through December 31,
16 2003; "[his] salary continued to be paid at the rate of \$8,000 per month" after the expiration of the
17 Amended Agreement, "the documents show that [Mr. Stamp] continued to receive payment of
18 \$8,000 per month," and Mr. Stamp "continued to receive [his] salary of \$8,000 per month until the
19 filing of the bankruptcy petition." *See* ECF No. 25-1, at 2, 3, 5. Indeed, Mr. Stamp's claim for
20 administrative priority for his attorney's fees of \$136,000 is derived from calculating his "regular
21 salary of \$8,000 per month" for 17 months post-petition. *See id.* at 6. If instead, Mr. Stamp was
22 due an hourly rate of \$250 per hour after the termination of the Amended Agreement as he now
23 claims, Mr. Stamp made no claim to that fact. Mr. Stamp also did not mention the supposed
24 attorney's lien, which presumably would have secured either form of compensation. Instead, Mr.
25 Stamp took the firm position that his salary was \$8,000 per month, which was paid in full to the
26 petition date and was the only attorney's fee to which he was entitled into the post-petition period.

27 Mr. Stamp is estopped from now asserting any alternative manner of compensation, such
28 as an hourly rate of \$250 per hour between January 1, 2004 to June 17, 2004, when Mr. Stamp

1 admitted that his salary was \$8,000 per month for which he was paid during that period, and made
2 no mention of any deferred attorney's fees. *See* ECF No. 25-1. The doctrine of equitable estoppel
3 prevents a party from assuming inconsistent positions to the detriment of another party. *United*
4 *States v. Georgia-Pac. Co.*, 421 F.2d 92, 96 (9th Cir. 1970). In the Ninth Circuit, four elements
5 must be present to establish the defense of estoppel: (1) the party to be estopped must know the
6 facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting
7 the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts;
8 and (4) he must rely on the former's conduct to his injury. *California State Bd. of Equalization v.*
9 *Coast Radio Prod.*, 228 F.2d 520, 525 (9th Cir. 1955). For example, a party's silence will work
10 an estoppel if he has a duty to speak under the circumstances. No other party is as familiar with
11 Mr. Stamp's claim for attorney's fees and a lien than Mr. Stamp. Yet Mr. Stamp said nothing for
12 8 ½ years since the commencement of this case, allowed the creditors and the Trustee to act on the
13 facts of his claims as originally filed, and now makes an absolute claim to the merger proceeds
14 that others brought into the estate after years of litigation and upend the compromise that will
15 resolve the disputes over the money.

16 As such, Mr. Stamp is also barred by the doctrine of laches from asserting a claim after an
17 unreasonable delay when the administrative creditors have undertaken great expense to collect the
18 estate's assets and the Trustee has crafted a compromise that will finally bring this case to a close.
19 As the Trustee pointed out in a related issue regarding the timeliness of the amended claim, Mr.
20 Stamp has offered no excuse for his neglect. *Cf. In re Pacific Gas & Elec. Co.*, 311 B.R. 84, 89-
21 91 (Bankr. N.D. Cal. 2004) (J. Montali) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd.*
22 *P'ship*, 507 U.S. 380 (1993)).

23
24 **III. Mr. Stamp Is Not Entitled to Any Additional Compensation Under the**
25 **Attorney-Client Agreement Because Mr. Stamp's Claim to an Hourly Rate Is**
Inconsistent With the Compensation That Was Being Paid to Him and the
Purpose and Terms of the Agreement to Contain Costs.

26 The Trustee agrees with the analysis of creditors David Mendelsohn, Larry Ginsburg and
27 Harold Silen (collectively, "Mendelsohn") that Mr. Stamp is not entitled to any additional
28 compensation under the Attorney-Client Agreement dated March 19, 2012 (the "Agreement") or

1 the Amended Agreement. *See* ECF No. 911. Contrary to Mr. Stamp's assertion that the Trustee
2 "admits that the full amount due under Paragraph 5.6 [of the Agreement] was not paid," the
3 Trustee strongly disputes the contention that Mr. Stamp was entitled to any hourly compensation
4 under that provision at all. The Trustee further incorporates his earlier argument that the bonus
5 should be disallowed, as set forth in the notice of objection at ECF No. 907.

6 Mr. Stamp understood that Excel was "hamstrung with limited resources," but that Excel
7 wished to secure adequate legal representation and at the same time to contain costs. *See* ECF No.
8 926, at 2:5-9. As Mendelsohn pointed out, the Agreement provided for a fixed fee arrangement:
9 Excel retained Mr. Stamp for a monthly retainer fee without any minimum billable time
10 requirements or the need to quantify service in terms of hours, and paid Mr. Stamp for his legal
11 services with a monthly retainer fee and costs. *See* ECF No. 910, at 2; Claim No. 14-2, Ex. A, at
12 6. The Agreement defined the monthly retainer as \$8,000 per month, payable in two equal semi-
13 monthly installments on or before the 1st and 16th day of each month during the engagement
14 period.² *See* Claim No. 14-2, Ex. A, at ¶ 2.1. The engagement period was supposed to last from
15 April 1, 2003 to September 30, 2003, but was extended for an additional three months to
16 December 31, 2003. *See* Claim No. 14-2, Ex. B, ¶ 1.

17 Thereafter, Mr. Stamp claims that his role "evolved" to that of in-house general counsel.
18 *See* ECF No. 914, 4:3-6. In response to the fact that there is no written agreement concerning his
19 retention or compensation after the end of the engagement period, Mr. Stamp states that they were
20 just "plain too busy." *See id.* at 4:8-10. (By comparison, the Amended Agreement was a single
21 page.) At the same time that Mr. Stamp claims to have become a common law employee after
22 January 1, 2004, Mr. Stamp continues to refer to provisions of the Agreement that terminated on
23 December 31, 2004. Mr. Stamp suggests Paragraph 5.6 triggered an incredible raise from the
24 \$8,000 per month that Excel had been paying him, to \$40,000 per month that he now believes was
25 due to him under an hourly rate arrangement! *See* ECF No. 927, at 4:3-8. This is completely
26 contrary to Mr. Stamp's position in Claim No. 25, the understanding that Excel wished to cap its

27
28 ² The Agreement originally provided that Excel would pay \$4,500 of Mr. Stamp's monthly flat fee, and
Excel's in-house counsel would pay the remaining \$3,500. Excel assumed in-house counsel's obligation to pay Mr.
Stamp's fee under the Amended Agreement. *See* Claim No. 14-2, Ex. B, at ¶ 2.

1 legal fees, and the fact that Excel continued to pay Mr. Stamp the same flat rate of \$8,000 per
2 month after December 31, 2003. Indeed, the Debtor's statement of financial affairs cited by Mr.
3 Stamp demonstrates that Excel paid Mr. Stamp \$8,000 each month in the ninety days before the
4 petition date, \$4,000 each on the 1st and 15th of every month just as the parties agreed. *See* ECF
5 No. 18, at 34. Moreover, Mr. Stamp admits to receiving \$8,000 per month for 5 ½ months
6 between January 1, 2004 and June 17, 2004. *See* ECF No. 927, at 5:11-16. Mr. Stamp now
7 claims, "[i]n recognition of Excel's limited resources, I agreed to defer \$20,000 of the bonus (80%
8 of what was owed). I also agreed to defer 80% of what was owed under the transitional \$250
9 hourly fee arrangement, accepting \$8,000 per month instead of the approximately \$40,000 per
10 month that would be owed under Paragraph 5.6 of the Agreement." *Id.* (citations omitted). There
11 is no evidence of any such agreement. Even the prospect of such an amendment or modification
12 to the terms of Mr. Stamp's compensation is ludicrous! By Mr. Stamp's math, Mr. Stamp is
13 essentially claiming his annual salary increased upwards to \$520,000 (1 year = 52 weeks, 52 x 40
14 hours/week x \$250/hour = \$520,000). Under such an arrangement, the \$50,000 raised from Betsy
15 Levy mentioned by Mr. Stamp as being used to "pay his salary" would make little sense as that
16 "warchest" would be entirely consumed by Mr. Stamp's fees in a little over a month. *See* ECF
17 No. 927, at 4.

18 As Mendelsohn also noted, the hourly rate is specifically limited to those "attorney
19 services that are necessarily performed by [Mr. Stamp], either to protect the interests of [Excel]
20 and/or as mandated by the Professional Rules of Conduct." *See* ECF No. 911, at 6. The various
21 legal services that Mr. Stamp claims to have provided to Excel were not so necessary as to protect
22 Excel's interest, especially when Excel had retained several other attorneys to conduct litigation.
23 *See, generally*, ECF Nos. 927, and 926, at 6:18-20. Mr. Stamp presents no evidence that he ever
24 billed Excel for his time between January 1, 2004 and June 17, 2004. In fact, the Debtor's
25 schedules do not list the estate as owing Mr. Stamp any additional compensation because Mr.
26 Stamp was paid the amount due to him every two weeks to the petition date. *See* ECF No. 18, at
27 13-20.

28 //

1 The Trustee notes that Paragraph 5.5 of the Agreement required Mr. Stamp to expedite the
2 transition of his responsibilities to new counsel – likely so Excel would not be slapped with a huge
3 bill based on the \$250/hour rate set forth in the following paragraph. *See* Claim No. 14-2, Ex. A,
4 at 8. If Mr. Stamp agreed to continue on as an employee of Excel after the engagement period, it
5 is clear that Mr. Stamp and Excel understood that his “salary” remained the same \$8,000 per
6 month that he earned as a monthly retainer fee. Mr. Stamp cannot go back now and claim hourly
7 compensation under Paragraph 5.6.

8
9 **IV. Even If Mr. Stamp Was Entitled to Some Compensation Under the**
10 **Agreement, Mr. Stamp’s Fees Must Be Disallowed Because They Far Exceed**
11 **the Reasonable Value of the Legal Services Provided and Mr. Stamp Failed to**
12 **Exercise Billing Judgment At All Times.**

13 Even if Mr. Stamp was entitled to additional compensation under the Agreement, the claim
14 for attorney’s fees and costs may be allowed only to the extent it is reasonable. *See Schoenmann*
15 *v. Bach Constr. (In re Segovia)*, 387 B.R. 773, 779 (Bankr. N.D. Cal. 2008) (J. Carlson). Section
16 502(b)(4) provides that a pre-petition claim based on services performed by an attorney or an
17 insider shall be disallowed to the extent the claim exceeds the reasonable value of the services
18 provided. *Id.* A claim for attorney’s fees is unreasonable under federal law to the extent the
19 attorney seeks fees that are disproportionate to the likely recovery. *See id.* (citing *Unsecured*
20 *Creditors’ Comm. v. Puget Sound Plywood, Inc.*, 924 F.2d 955, 959 (9th Cir. 1991)). Mr. Stamp
21 was required to scale his efforts to the reasonably expected recovery, not the potential optimum
22 recovery. *See id.* (citing *Digesti & Peck v. Kitchen Factors, Inc. (In re Kitchen Factors, Inc.)*, 143
23 B.R. 560, 562 (9th Cir. BAP 1992)).

24 Although Mr. Stamp seems to suggest the patent claims alone were worth as much as \$200
25 million, this large number is dispelled by other figures that placed Excel’s value at just \$5 million
26 and the ultimate recovery of only \$925,000 to the estate. *See* ECF Nos. 729, 926, at 6, 12. Mr.
27 Stamp makes an excessive claim to at least \$240,000 in hourly fees, which he claims to have ran
28 up in just 5 ½ months. *See* ECF No. 926, at 7:2-7. This is grossly unreasonable considering Mr.
Stamp understood that Excel expected a “torrent of litigation.” *See id.* at 2:5-7. As discussed
above, Mr. Stamp presents no evidence of timeslips detailing how he allocated his time, any

1 description of the services performed during this time that were necessary to protect Excel's
2 interests or mandated by the Professional Rules of Conduct, or any invoices to Excel during the
3 entire period that Mr. Stamp was supposedly billing \$250 per hour. Instead, it seems that Mr.
4 Stamp went back ten years to charge the Debtor for time based on full-time employment, whether
5 or not Mr. Stamp actually worked on a matter necessary to protect Excel's interest. As the
6 Supreme Court has stated, an attorney should not in any context be compensated for hours that are
7 not reasonably expended. *Segovia*, 387 B.R. at 779-80 (citing *Hensley v. Eckerhart*, 461 U.S. 424
8 (1983)). In this case, Excel already paid Mr. Stamp a monthly fee or salary of \$8,000, which the
9 parties agreed to be reasonable, so Mr. Stamp should not be entitled to any further compensation
10 from the estate.

11 **V. Mr. Stamp's Claimed Attorney's Lien is Invalid Because It Does Not Comply**
12 **with California Rules of Professional Conduct, Rule 3-300.**

13 An attorney who takes a charging lien in an hourly fee matter creates an adverse interest
14 between the attorney and his client. *Fletcher v. Davis*, 33 Cal. 4th 61, 68-70 (2004).³ An
15 attorney's lien that does not strictly comply with Rule 3-300 is invalid and unenforceable. *Id.* at
16 71-72.

17 Rule 3-300, entitled Avoiding Interests Adverse to a Client, provides in pertinent part, that:

18 A member shall not enter into a business transaction with a client; or knowingly acquire an
19 ownership, possessory, security, or other pecuniary interest adverse to a client, unless each
of the following requirements has been satisfied:

20 (A) The transaction or acquisition and its terms are fair and reasonable to the client and
21 are fully disclosed and transmitted in writing to the client in a manner which should
reasonably have been understood by the client; and

22 (B) The client is advised in writing that the client may seek the advice of an
23 independent lawyer of the client's choice and is given a reasonable opportunity to seek that
advice; and

24 (C) The client thereafter consents in writing to the terms of the transaction or the terms
25 of the acquisition.

26 //

27 _____
28 ³ Notably, Mr. Stamp cites *In re Bouzas*, 294 B.R. 318 (Bankr. N.D. Cal. 2003) (J. Tchaikovsky), which cited
the court of appeal's overturned decision in *Fletcher v. Davis*, 130 Cal. Rptr. 2d 696 (2003), *rev'd*, 33 Cal. 4th 61
(2004).

1 Rule 3-300 is intended to apply where an attorney wishes to obtain an interest in a client's
2 property (ownership, possessory, security, or other pecuniary interest adverse to the client) in
3 order to secure the amount of the attorney's past due or future fees. *Fletcher*, 33 Cal. 4th at 67.
4 An attorney's charging lien is a security interest in the proceeds of litigation, an adverse interest
5 within the meaning of Rule 3-300, and requires a client's informed written consent. *Id.* at 67-69.
6 Thus, "[w]hen an attorney wishes to secure payment of hourly legal fees and costs of litigation by
7 obtaining a charging lien against a client's future recovery," Rule 3-300 requires the attorney to
8 "explain the transaction fully, to offer fair and reasonable terms, to provide a copy of the
9 agreement, to give the client an opportunity to seek independent legal advice, and to secure the
10 client's written consent." *Id.* at 71. The attorney must satisfy all three requirements. *BGJ Assoc.,
11 LLC v. Wilson*, 113 Cal. App. 4th 1217, 1226 (2003). It is the attorney's responsibility to comply
12 with Rule 3-300. If the attorney fails to comply with the rule, the "lien may not be enforced" in a
13 proceeding to enforce a charging lien. *Fletcher*, 33 Cal. 4th at 71-72.

14 **A. Mr. Stamp's claim reflects that he did not comply with Rule 3-300**
15 **so the asserted attorney's lien is invalid and unenforceable.**

16 Mr. Stamp's claim reflects that he did not comply with Rule 3-300, particularly as to
17 provisions (B) and (C), and therefore his claimed attorney's lien is invalid and unenforceable as a
18 matter of law. On December 5, 2012, Mr. Stamp filed an amendment to Claim No. 14 and
19 included as an exhibit the Agreement dated March 19, 2003 but effective April 1, 2003. The
20 Agreement provides, in pertinent part:

21 4. Attorney's Lien. Clients hereby grant a lien against any settlement, judgment or
22 other recovery or award to secure payment of Attorney's compensation and costs as
23 provided under this Agreement (sic) . . .

24 6.8. Legal Advice: Each of the Parties warrants, represents and agrees that, in executing
25 and delivering this Agreement, such party does so freely and voluntarily, and that such
26 party has had the opportunity to receive legal advice from an attorney before executing and
27 delivering this Agreement.

28 Noticeably absent from the Agreement is compliance with provisions (B) and (C) of Rule
3-300 in that Mr. Stamp and the Agreement did not prior to delivery and execution advise the
clients in writing that the clients may seek the advice of an independent lawyer of the clients'
choice or give the clients a reasonable opportunity to seek that advice. To the extent that Mr.

Stamp argues the Agreement complied with Rule 3-300 because Excel president Ned Hoffman and attorney Ali Kamarei allegedly drafted the document and the parties (Mr. Stamp, Mr. Hoffman, and Mr. Kamarei) discussed the Agreement is without any merit. Actual consultation with another attorney does not relieve the member of the rule's obligation. *BGJ Assoc.*, 113 Cal. App. 4th at 1226. It is Mr. Stamp who had a duty to his clients to comply with Rule 3-300. Mr. Stamp failed in this regard. Mr. Stamp states that the parties met on March 19, 2003, discussed and finalized the agreement. *See* ECF No. 927, at 2:12-16. The parties executed the Agreement on the same day and the clients did not have a reasonable opportunity to seek the advice of independent counsel. *See* Claim No. 14-2, Ex. A, at 9. The clients' consent must have followed the opportunity to consult with independent counsel; it is not an alternative to such consultation. *See Passante v. McWilliam*, 53 Cal. App. 4th 1240, 1243, 1248 (1997). No amount of dialogue can cure Mr. Stamp's non-compliance with Rule 3-300. *Cf. Ames v. State Bar of California*, 8 Cal. 3d 910 (1973). To ensure the fairness of such dealings, it is incumbent upon the attorney entering into such transactions to advise the client to seek independent counsel.

The Amended Agreement does not save Mr. Stamp or his claimed attorney's lien. While Mr. Stamp may contend that the Amended Agreement extended his claim of an attorney's lien for another three months, the lien is likewise invalid and unenforceable without compliance with Rule 3-300. The Amended Agreement did not "cure" the defects in the original Agreement because it did not itself contain the required statement as to the client's right to consult with an independent attorney regarding the creation of the lien or the written consent of the client. *See Segovia*, 387 B.R. at 784.

B. Mr. Stamp's alleged oral agreement modifying or extending his claimed attorney's lien does not satisfy the requirements of Rule 3-300.

The attorney's lien arises upon execution of the retainer agreement between the attorney and the client. *Bluxome Street Assoc. v. Fireman's Fund Ins. Co.*, 206 Cal. App. 3d 1149, 1158 (1988). However, Mr. Stamp's services terminated pursuant to the specific dates under the Agreement and the Amended Agreement. Claim No. 14, as amended, purports to assert an

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1 attorney's lien for services rendered as an employee after December 31, 2003. Mr. Stamp is not
2 entitled to an attorney's lien for services rendered as an employee.

3 Upon the termination of the Agreement, as amended, Mr. Stamp contends that he morphed
4 from "general litigation counsel" into "in-house counsel" and "common law employee." *See*
5 Claim No. 25-1, at 2. Mr. Stamp concedes that "[b]ecause of the history of my relationship with
6 Mr. Hoffman over the prior 9 months, as well as the fact that we were just plain too busy, we did
7 not put the employment agreement in writing." *See* ECF No. 914, at 4:7-10. Any oral agreement
8 is contrary to the express language of the Agreement regarding termination and modification. In
9 pertinent part, the "Agreement constitutes the entire agreement and understanding between the
10 parties . . . This Agreement may not be modified unless in writing and signed by both parties . . ."
11 *See* Claim No. 14-2, Ex. A, at ¶ 6.1. Furthermore, the Agreement specifically provides, "Attorney
12 shall at all times be deemed an independent contractor. Attorney shall not act nor hold himself out
13 as acting as an agent, employee, or associate of Clients" *See id.* at ¶ 6.3. Mr. Stamp's
14 assumed role as an employee was a new, independent agreement without the benefit of a written
15 retainer agreement, or attorney's lien.

16 Regardless of Mr. Stamp's role after the engagement period, there is still no evidence of
17 compliance with Rule 3-300, so any oral agreement is invalid and unenforceable relative to any
18 attorney's lien. Mr. Stamp's implication that his relationship with Mr. Hoffman somehow
19 justified his non-compliance with Rule 3-300 is absurd. Rule 3-300 requires full, written
20 disclosure to the client simply so the client is protected from the attorney. *See Fletcher, supra.*
21 Alternatively, Mr. Stamp's position as an employee meant he had to perfect any lien consistent
22 with the California Commercial Code. There is no evidence he did so.

23 **C. Mr. Stamp's claimed attorney's lien was not listed as a secured debt in**
24 **the Debtor's schedules despite Mr. Stamp's assistance preparing the**
schedules and his post-petition services as in-house counsel.

25 Claim No. 25 asserts, in relevant part, that Mr. Stamp "assisted Lanahan & Reilley in
26 preparation of the bankruptcy petition, providing all the background on the pending litigation" and
27 "appeared with Mr. Hoffman as counsel for Excel at the initial creditors' meeting before the
28 Bankruptcy Trustee." *See* Claim No. 25-1, at 4. However, Mr. Stamp did not list himself in the

Debtor's schedules, including Schedules D or G, as a secured creditor or having an executory contract with the Debtor. *See* ECF No. 18, at 13, 21. Although Mr. Stamp's administrative claim asserts that he worked as in-house counsel for a period of 17 months post-petition, Mr. Stamp did not take any action to amend the Debtor's schedules or file a proof of claim to show that he had a claim and/or an attorney's lien. Only upon the filing of the amendment to Claim No. 14 on December 5, 2012 – more than 7 years after Mr. Stamp's "termination" from Excel – did Mr. Stamp suggest that he had a contract and/or an attorney's lien. The inconsistency between Mr. Stamp's assertions and the Debtor's schedules, which Mr. Stamp says he helped prepare, strongly suggest that the Debtor did not believe Mr. Stamp had a valid lien against the estate's assets or a valid executory contract as of the petition date, and Mr. Stamp did not disagree.

D. The purported fee agreements are voidable because Mr. Stamp did not provide the clients with a duplicate copy of the signed agreements at the time of contracting.

Pursuant to California Business & Professions Code § 6148(c), an attorney must provide the client with a duplicate copy of the signed contract (signed by both) at the time of contracting or the contract is voidable at the option of the client. The alleged agreements were not listed or referenced in the Debtor's schedules and none of Mr. Stamp's claims indicate he provided the clients with duplicate copies of the signed agreements at the time of contracting. As there is no evidence to show Mr. Stamp provided Excel with duplicate copies of the signed agreement at the time of contracting, the agreements are voidable.

VI. To the Extent Mr. Stamp Has a Secured Claim to the Proceeds, the Trustee May Surcharge Mr. Stamp's Collateral for the Necessary Costs and Expenses of Preserving the Property Under 11 U.S.C. § 506(c).

Mr. Stamp waited 8 ½ years from the commencement of this case to claim an attorney's lien on all of the property of the estate. As this Court is aware, during that entire period, the estate has incurred substantial fees from its numerous attorneys to collect and preserve the merger proceeds, which is the only asset of the estate, including prosecution of the unfinished turnover litigation to conclusion. Section 506(c) allows the Trustee (or the debtor in possession) to recover from property securing Mr. Stamp's attorney's lien, if allowed, the reasonable, necessary costs and expenses of preserving the proceeds to the extent of any benefit to the holder of such claim.

1 Those administrative expenses are substantial and the pursuit of a surcharge would clearly be
2 justified where the surcharge from the secured party's collateral to an administrative claimant
3 would increase the pool of unencumbered assets to pay the other administrative claims. *Cf. In re*
4 *Suntastic USA, Inc.*, 269 B.R. 846, 849-50 (Bankr. D. Az. 2001).

5 **CONCLUSION**

6 WHEREFORE, the Trustee respectfully requests the Court (1) deny Mr. Stamp's motion to
7 enforce an alleged attorney's lien against property of the estate; (2) sustain the Trustee's objection
8 to Claim No. 14, as amended; and (3) deny Mr. Stamp's objection to the Trustee's motion to
9 approve the compromise of claims among several administrative claimants. DATED: This 15th day
10 of August, 2011.

11 DATED: January 25, 2013.

12 STROMSHEIM & ASSOCIATES

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14 /s/ Johnson C. W. Lee
15 Attorneys for MARC DEL PIERO, Trustee
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